

of the master to use due care in the selection of competent servants, and in furnishing them with all the proper and suitable means and machinery for the safe performance of the duties intrusted to them, the performance of which duty will relieve the master from liability to an employe who receives an injury by reason of the carelessness of a co-employe engaged in the same service; or (2) a liability under the statute of Iowa, which enacts that railway companies shall be liable to such of their employes as are engaged in the operating of the railroad for the injuries caused by the negligence of a co-employe. If the action against the company is based upon the first ground, it is apparent that the fact that the engineer was guilty of negligence in the running of the train which would constitute a cause of action against him, would not alone show a violation of duty on part of the company. If based upon the liability created by the statute, it is equally clear that the ground of action is distinct and separate from that charged against the engineer.

Under the allegations of the petition, in order to entitle plaintiff to recover against the defendant Emsley, it must be shown that he himself was guilty of negligence in the management of the train under his charge, resulting in injury to the deceased. Failing in proof of personal negligence on part of the engineer, plaintiff could not recover against him, but that would not entitle the company necessarily to a verdict in its favor. In the petition it is expressly charged that the defendants, "while operating and running a passenger train over the defendants' road, did carelessly, negligently, and wrongfully run said train of cars upon and against Alvis Fink." In legal effect, this charges that the defendant company negligently and carelessly ran said train of cars; and, under this allegation, it is open to plaintiff to show negligence on part of any employe of the company in the running of said train; and if negligence on part of a flagman, or on part of the conductor, train dispatcher, or road-master, in connection with the running of said train, could be proven as a matter of fact, and that such negligence was the proximate cause of the death of deceased, then the plaintiff could recover against the company, but not against the engineer.

Under the averments of fact in the petition, two controversies are presented,—one between plaintiff and the defendant Emsley, and one between plaintiff and the defendant company. In the controversy between plaintiff and Emsley, the company has no part nor lot. It has no legal interest therein; and, if the plaintiff and Emsley were citizens of different states, the latter could remove the action, even if the company and plaintiff were citizens of the same state. In the controversy between plaintiff and the company, Emsley has no legal interest. The cause against the company not only can be separated, but must be separated, from that against Emsley, because the grounds of liability are legally different. Although the case may be tried as one before the same jury, the issues upon which the liability of the

defendants depends are different, and cannot be made the same by any form of averment in the petition. According to the rule laid down in *Ayres v. Wiswall*, *supra*, there is involved a separable controversy, justifying the removal of the cause to this court, under the act of 1875.

Motion to remand is therefore overruled.

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WESTERN UNION TEL. CO. v. BALTIMORE & OHIO TEL. CO.

(Circuit Court, S. D. New York. December 24, 1885.)

1. INJUNCTION—PRIVATE LETTERS—WHEN OPPOSING PARTY ENTITLED TO PUT IN EVIDENCE.

Where a party seeking to procure an interlocutory order uses documents or letters in the affidavit therefor, at any subsequent stage of the action, the opposing party will be entitled to introduce such letters or documents in evidence against the party who originally used them.

2. SAME—CORPORATIONS—LETTERS OF THE OFFICERS OF.

A corporation can speak or act only through its officers or agents, and their declarations made in the course of their employment, and relating to the immediate transaction in which they are engaged, are always competent as against the company.

3. SAME—CONFIDENTIAL COMMUNICATION—LETTER OF CORPORATION'S ATTORNEY.

Where a corporation has produced in evidence fragmentary parts of the letters of its attorney, written to the other officers of the company, it cannot be allowed to shelter itself behind the privilege to insist upon the privacy of the communications. By introducing any part it surrenders its privilege as to the whole of such letters.

In Equity.

*Dickerson & Dickerson*, for complainant.

*Frederick H. Betts*, for defendant.

WALLACE, J. Upon a motion in this cause for a preliminary injunction one of the questions involved was whether the reissued patent upon which the suit is founded was obtained for the legitimate purpose of correcting mistake or inadvertence in the specification and claims of the original, or whether it was obtained merely for the purpose of expanding the claims of the original in order to subordinate to the reissue certain improvements or inventions made by others intermediate the grant of the original and the application for the reissue. To fortify its theory of the true reasons for obtaining the reissue the complainant upon that motion embodied in affidavits then used extracts from communications made by Mr. Buckingham, a patent expert and attorney in the office of the general solicitor of the complainant, to the president and the vice-president of the complainant, when the subject of applying for a reissue was under consideration by the officers of the complainant, and while the proceedings for a reissue were pending. The cause has proceeded to the taking of proofs for final hearing, and the defendant now wishes to introduce in evidence